

**ORDINANCE NO. 20081016-031**

**AN ORDINANCE GRANTING TO THE PEDERNALES ELECTRIC COOPERATIVE, INC., ITS LEGAL REPRESENTATIVES, SUCCESSORS, LESSEES AND ASSIGNS CERTAIN POWERS, LICENSES, RIGHTS-OF-WAY, PRIVILEGES AND FRANCHISE TO CONSTRUCT, MAINTAIN, OPERATE AND USE A TRANSMISSION AND DISTRIBUTION SYSTEM IN THE CITY OF AUSTIN TO PROVIDE ELECTRIC UTILITY SERVICE; AND PROVIDING A PROCESS FOR RESOLVING VIOLATIONS OF THE ORDINANCE.**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:**

**PART 1.**

**SECTION 1. Definitions.**

1 1. For the Purpose of this Ordinance the following terms, phrases, words and their derivations shall have the meanings given herein When not inconsistent with the context, and whenever the sense of the text requires. (1) words used in the present tense include the future, (2) words in the plural number include the singular number, (3) words in the singular number include the plural number, and (4) the use of any gender shall be applicable to all genders The words "shall" and "will" are mandatory and the word "may" is permissive Words not defined shall be given their common and ordinary meaning

1 2. "City" shall mean the City of Austin, Texas, a municipal corporation in the State of Texas, as constituted as of the effective date of this Ordinance or as may hereafter be constituted

1 3 "Cooperative" shall mean the Pedernales Electric Cooperative, Inc., a rural electric cooperative organized and existing under and by virtue of the laws of the State of Texas, and authorized to transact and actually transacting business in the State of Texas, together with its legal representatives, successors, lessees and assigns

1 4. "City Manager" shall mean the City Manager of the City or the Manager's authorized designee

1 5 "Consumer" shall mean any person or organization receiving and using electric utility service from the Cooperative for his or her own appliances or equipment whether or not the electricity is billed directly to him or her, or to a second party For

example, in the case of a rental unit where the cost of utilities are part of the rent, the landlord is a Customer, as defined herein, and the tenant is the Consumer.

1.6 "Council" shall mean the governing body of the City of Austin

1.7 "Customer" shall mean any person or organization being billed for electric utility service whether used by that person or organization, or by others

1.8 "Chief Financial Officer" shall mean the Chief Financial Officer of the City of Austin, or his designee. The term shall also mean the Chief Financial Officer's successor in function.

1.9 "Director of Public Works" shall mean the Director of the Public Works Department of the City of Austin, or its successor Department. The term shall also mean the Director's successor in function.

1.10 "Transmission and Distribution system" or "System" shall mean all interrelated lines, equipment, poles, installations and systems, fixtures, and other facilities or appurtenances including substation facilities used or necessary for the transmission and distribution of electric utility service to consumers or customers in the City and its environs by the Cooperative.

1.11 "Franchise" shall mean this Ordinance, and all rights and obligations established herein or as amended.

1.12 "Electricity or electric utility service" shall mean energy (kWh) and power (kW) sold, distributed, conveyed or otherwise conducted, served, supplied and furnished to inhabitants of the City and others, and to the City, where applicable, by the Cooperative.

1.13 "Gross Receipts" shall mean the total amount collected by the Cooperative from any and all customers from the retail sale of electric utility service within the City.

1.14. "Pole Rental Agreement" means the standard agreement prescribed and used by the Electric Utility Department of the City of Austin, between the City and any person attaching equipment, lines or cable to the City's electric utility poles.

1.15. "Public Easement" or "Easement" shall mean those easements held, owned or controlled by the City, and the terms, conditions or limitations upon such easements that are not inconsistent with the construction or maintenance of an electric utility transmission and distribution system.

1 16 "Sidewalk" shall mean a paved area, within the street right-of-way or sidewalk easement, specifically designed for pedestrians or bicyclists.

1 17 "Street", "Avenue" or "Alley" shall mean a publicly dedicated or maintained right-of-way, a portion of which, is open to use by the public for vehicular travel.

1.18 "Public way" or "public rights of way" shall mean streets, avenues, easements (other than private easements obtained by the Cooperative), rights-of-way, alleys, highways, grounds of the City and beneath the surface of the same as they now or hereafter may exist and as defined herein. It shall also mean sidewalks, bridges and other structures, places and public grounds of the City, as they now or hereafter may exist and as defined herein. A reference in this franchise to a "public way" or "public rights-of-way" shall not be a representation or guarantee by the City that its interests or other rights in the property are sufficient to permit its use of the installation and maintenance of a System and the Cooperative shall receive only those rights which the City has the right and power to give.

1 19 "City utility" shall mean any utility service provided by the City including, but not limited to electric, water, and/or sewer utility service.

1.20. "Cooperative's Service Regulations" shall mean the Service Regulations of the Cooperative, as are now, or as shall in the future be approved by the City Council or other regulatory authority having jurisdiction.

1 21 "Office of Right of Way Management" means the Office of Right of Way Management within the City's Watershed Protection and Development Review Department, or its successor office with responsibility for review and approval of work within public rights of way.

## **PART 2. Granting of Franchise**

2 1 There is hereby granted to the Cooperative a non-exclusive franchise to maintain, construct, equip, extend, replace, alter, and otherwise establish in the City a transmission and distribution system for the provision of electric utility service. It is understood that this franchise authorizes only such transmission and distribution system as is necessary or appropriate to provide electric utility service.

2 1 1 In accordance with and during the term of this franchise grant, the Cooperative is hereby granted passage and right-of-way in, under, along and across, any and all public ways. The Cooperative is further granted the right to occupy and use in any lawful way, said public ways in accordance with and during

the term of this franchise. This occupancy and use is granted solely for the services, uses, effects, and lawful purposes described herein

2 1 2. Nothing herein shall be construed to require or authorize the Cooperative to exceed its certification rights granted by the Public Utility Commission of Texas, except as may be mutually agreed upon by the City and the Cooperative

2 1 3 The Cooperative shall, except in the case of a bona fide emergency, provide ten (10) calendar day notice to the Director of Public Works before commencing any excavation in the paved portion of any public way In the case of a bona fide emergency the Cooperative shall provide notice to the Director of Public Works of any such excavation as soon as reasonably practicable. Excavations shall be performed in accordance with applicable City ordinances and rules Except as otherwise provided in this Ordinance, City ordinances and rules shall apply to the method and time required for advance notices, and to time periods, including but not limited to time periods for completion of any work, or expiration of any permit

2.2 The Cooperative shall, prior to constructing any facility within City parks or on land hereafter designated as a City park, comply with all applicable State laws, including Chapter 26 of the Texas Parks and Wildlife Code, and with all applicable City rules and regulations.

2 3 The operation, construction, and maintenance of the Cooperative's transmission and distribution system and other property subject to this franchise shall be subject to all applicable laws of the United States, the State of Texas, the City Charter, and City Ordinances, rules and regulations The venue for all causes of action arising under this Ordinance shall be in the District Courts of Travis County, Texas.

2 4 The initial term of this franchise shall expire seven (7) years from the effective date of this Ordinance, and shall include the period between March 4, 2006 and the effective date of this Ordinance. At the end of the initial term, the term shall be automatically renewed for one additional five (5) year period, unless (i) the Cooperative is in default under the terms of this Ordinance and written notice is given to the Cooperative by the City or (ii) written notice is given to the City by the Cooperative

2.4 1 The written notice must be provided 120 days before the end of the initial term The notice shall specify either the desire to reconsider or the desire to terminate this franchise, in which event this franchise shall either be renegotiated or terminated at the end of the initial term.

2 4 2 The City requests that the Cooperative also give twelve (12) month written notice to the City of the expiration of the initial term, as well as the five (5) year renewal term, if applicable. The Cooperative's failure to provide the City with such twelve (12) months written notice shall not constitute a breach of the franchise or affect the continuation of the franchise.

2 5 The Cooperative shall not transfer this franchise or any rights and privileges granted herein without written approval of the Council expressed by Ordinance. Such approval shall not be unreasonably withheld. Once approved, the Cooperative shall provide written notice of the actual transfer within thirty (30) days of the completion of the transfer.

### **SECTION 3. Acceptance by the Cooperative**

3 1 This franchise shall not become effective until accepted by the Cooperative in writing. The acceptance shall be filed with the City within sixty (60) days following the final adoption of this Ordinance by the Council. Upon acceptance by the Cooperative, this Ordinance shall be a contract duly executed by and between the City and the Cooperative.

### **SECTION 4. Service**

4.1 Electric utility service shall be provided by means of the Cooperative's transmission and distribution system which shall be located within the public ways or on private property. The Cooperative shall use reasonable efforts to assure that all future locations of the transmission and distribution system shall not unreasonably interfere with the flow of water in any gutter or drain; the operations or facilities of any City utility, any television cable, telephone facilities, traffic control signals, street lights, fire lines or other communication lines, or ordinary travel on the streets or sidewalks.

4 2 The location and route of all Cooperative transmission and distribution system facilities shall be subject to

4 2 1 the lawful, reasonable and proper control of the City; and

4 2 2 all ordinances, laws, rules, regulations, and Charter provisions of the City now in force or that may hereafter be passed and adopted which are not inconsistent with this Ordinance.

4.3. The surface of any public way disturbed by the Cooperative in the construction or maintenance of its transmission and distribution system shall be restored within a reasonable time after the completion of the work to as good a condition as before.

the commencement of the work. The City shall have ninety (90) days from the date of such restoration, to determine whether the restored surface requires additional work to place it in as good a condition as before the commencement of the work. If the City makes such determination, the Cooperative shall perform all additional restoration work to the reasonable satisfaction of the City. No public way shall be encumbered for a period longer than reasonably necessary to complete all work.

4.4 The Cooperative shall not unreasonably discriminate in furnishing electric utility service on the terms provided in the Cooperative's service regulations and line extension policy, as they may be in effect from time to time. The Cooperative shall not deny electric utility service, or otherwise discriminate against applicants for service or customers, on the basis of race color, religion, national origin, sex, or sexual orientation. Electric utility service shall be provided to all areas of the City for which the Cooperative holds a valid Certificate of Convenience and Necessity issued by the Public Utility Commission of Texas, or for which the Cooperative provides service as a result of an agreement with the City of Austin.

4.5. The Cooperative shall maintain its property and transmission and distribution system in good order and condition, consistent with the needs of the service to be rendered therefrom. The City recognizes and agrees that the Cooperative shall retain full title in, and right to, its personal property, whether or not the same is incorporated in real estate.

4.6 The City, at any time, may make reasonable inquiries pertaining to this Ordinance, and the Cooperative shall respond to such inquiries on a timely basis.

4.7 The Cooperative shall keep the City informed concerning the Cooperative's conservation programs. Upon request, the Cooperative shall deliver to the City a copy of the energy efficiency plan, if any, required to be filed by the Cooperative with the Public Utility Commission of Texas pursuant to the rules and regulations of that Commission.

4.8 In addition to the consideration set forth herein, the Cooperative shall permit the City to use the Cooperative's facilities in accordance with the terms and conditions of the Agreement for Joint Use of Electric System Poles, between the City and the Cooperative, effective March 18, 1996, as it may be amended from time to time.

## **SECTION 5. Use of Streets and Easements**

5.1 The Cooperative is hereby authorized, licensed and empowered to do any and all things necessary and proper to be done and performed in executing the powers and using the privileges granted and described by this franchise. Provided, however, that such activities shall not conflict with existing water pipes, sewer, electric power lines,

telephone lines, cable television lines and other authorized installations. Provided also, that all work done in the public ways by the Cooperative shall be done with reasonable diligence and without unreasonable inconvenience to the public or individuals.

5.2. By the grant of authority described in Section 5.1, it is not the intention of either the City or the Cooperative to create any liability, right or claim for the benefit of third parties and this franchise is intended and shall be construed for the sole benefit of the City and the Cooperative.

## **SECTION 6. Construction, Maintenance, Expansion, Reconstruction, and Excavation**

6.1. In furtherance of the public interest in safety, health and public welfare and to facilitate the safe management of public right of way, the construction, expansion, reconstruction, excavation, use, maintenance and operation of the Cooperative's system and property is subject to all generally applicable City requirements. In addition to any other City requirements, the Cooperative shall provide the City's Office of Right of Way Management, or such other officials as the City may designate, construction plans and maps showing the routing of any new construction and construction plans, 45 days prior to the commencement of construction which involves an alteration to the surface or beneath the surface of the public right-of-way, to the extent generally required. The Cooperative shall not begin construction until the plans and drawings have been approved in writing by the Office of Right of Way Management, this approval shall not be unreasonably delayed. The Cooperative shall participate in the Austin Utility Location Coordination Committee ("AULCC") meetings and coordinate new construction with the AULCC. The Cooperative's facilities shall bear the identification marks established by the AULCC if the facilities are installed after the AULCC establishes identification marks.

6.2. On written request by the City, the Cooperative shall remove and abate a facility, when the Office of Right of Way Management declares an emergency. The Cooperative and the City shall cooperate to the extent possible to assure continuity of service. If the Cooperative, after notice, fails or refuses to act, the City may remove or abate the facility, at the sole cost and expense of the Cooperative, without compensation or liability for damages to the Cooperative.

6.3. On completion of initial or any subsequent construction work, the Cooperative shall promptly restore the public right-of-way in accordance with applicable City requirements. The Cooperative may excavate only for the construction, installation, expansion, repair, removal, and maintenance of its facilities.

6 4. Except in an emergency, the Cooperative may not excavate pavement in a public alley or street or significant amounts of an unpaved public right-of-way without first complying with applicable City requirements

6 5 Within 120 days of completion of each segment of the Cooperative's facilities, the Cooperative shall supply the City with a set of "as built" drawings for the segment in a format prescribed by the Public Works Director. The Cooperative shall provide every year a set of "as-built" drawings incorporating changes to the Cooperative's facilities in the public right-of-way, in a format prescribed by the Public Works Director.

**SECTION 7. Work by the City and Others; Use of Cooperative's Facilities; Maintenance of Street Lights**

7 1 The City reserves the right to lay, and to permit to be laid, sewer, cable television, water, telephone, electric and other lines, cables and conduits, and to do and permit to be done any underground or overhead work that may be necessary or proper in, across, along, over, or under any public way occupied by the Cooperative. Without waiving any Constitutional or statutory prohibitions to the contrary, the City shall only be liable to the extent permitted by law to the Cooperative for the damage, if any, to the Cooperative's transmission and distribution system which is the result of the negligence or willful misconduct of the City or its employees. The City shall not be liable, under any circumstances, for damages caused to the Cooperative as a result of work done by persons other than the City's employees, or the City's agents or contractors unless the specific actions taken or specific work done by the City's agents and contractors which is the subject of the claim for damages was performed under the direction, supervision or control of the City. By this agreement it is not the intention of either the City or the Cooperative that the City assume liability in general for the negligence or willful misconduct of the City's agents or contractors for any and all work performed by them for or on behalf of the City, but only in the limited circumstances described above. Removal and relocation expenses incurred by the Cooperative shall be reimbursed by the person for whom the removal or relocation is made, except as provided in Section 8.

7 2 In addition to the consideration set forth herein, the Cooperative shall permit the City to use the Cooperative's existing facilities, without charge, where the existing facilities are adequate for the City's own purposes, said purposes being traffic, signal, police and fire alarm systems, referred to for purposes of this Section 7 2 as "Traffic Lights". Traffic Lights shall not include revenue producing or commercial access telecommunications systems, including, but not limited to fiber optics and cable television systems. The Cooperative shall provide space on existing facilities and those to be constructed in the public rights-of-way for the City to attach Traffic Lights.



7 2 1 The Cooperative agrees to provide for and accommodate Traffic Lights when the Cooperative constructs any new facilities, or when the Cooperative upgrades existing facilities during scheduled maintenance activities

7 2 2 If existing Cooperative facilities are inadequate, and the City requests space on Cooperative facilities to accommodate Traffic Lights, the Cooperative shall upgrade its facilities at the City's expense. The City shall reimburse the Cooperative for the difference between the cost of the upgraded facilities required to accommodate the Traffic Lights and the cost of replacing the existing facilities.

## **SECTION 8. Changes for Governmental Purposes**

8 1 Within 120 days following written notice from the City, the Cooperation shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any of this System or other parts of its facilities that are within the public rights-of-way if the City determines that the removal, relocation, change or alteration is reasonably necessary for

8 1 1 The construction, repair, maintenance or installation of any City or other public improvement in or upon the public rights-of-way

8.1 2 The operations of the City or other governmental entity in or upon the public rights-of-way

8 2 Schedules for the work contemplated by Section 8 1 shall be developed by designated representatives of the Cooperative and the City. If such representatives cannot agree on the schedule, the City Manager, after consultation with the Cooperative, shall establish a schedule. This schedule shall provide for a minimum of thirty (30) days to exist between the time the schedule is furnished to the Cooperative and the time that any specific work to be done by the Cooperative covered in the schedule is to begin.

8 3 If the work contemplated by this Section is funded, in whole or in part, with federal or state highway moneys, the federal government or state may provide compensation for utility adjustments. If such compensation is provided, the City shall request that compensation also be provided to the Cooperative by the funding authority. If the City receives such compensation, it shall deliver to the Cooperative that portion of the compensation attributable to the Cooperative's costs of removal or relocation.

## **SECTION 9. Captions and Severability**

9.1 The use of captions or headings for the various sections of this Ordinance are for the convenience of the parties only and do not reflect the intent of the parties. This Ordinance shall be construed and deemed to have been drafted by the combined efforts of the City and the Cooperative.

9.2. Notwithstanding anything contained herein to the contrary, in the event that any part of this Ordinance is declared by any court of law to be unenforceable, void, unlawful, or otherwise inapplicable, the remainder of the provisions of this Ordinance shall remain in full force and effect and shall in no way be affected, impaired or invalidated. In such event, the level of compensation to be provided to the City shall continue to be comparable to that set forth in this Ordinance.

## **SECTION 10. Fees**

10.1. The City and the Cooperative agree that the public way to be used by the Cooperative in the operation of its transmission and distribution system is valuable public property acquired and maintained by the City at the expense of its taxpayers. The City and the Cooperative agree that the City will incur costs in regulating and administering the franchise granted by this Ordinance ("administration costs"). In consideration of the use of the public way and to defray the City's administration costs, the Cooperative shall, until it adopts customer choice, pay to the City two percent (2%) of its Gross Receipts per calendar quarter in each case payable quarterly as specified in Section 10.3. On and after the date Grantee implements customer choice, a rate consistent with the Texas Utilities Code, § 33.008, Franchise Charges, as it may be amended, for each kilowatt hour of electricity delivered by Grantee to retail customers within the City of Austin for the calendar year.

10.2. The City and the Cooperative recognize that the Cooperative may enter into franchise agreements after the effective date of this franchise with other municipalities. The City and the Cooperative further recognize that the Cooperative may agree to pay for the use of said municipality's public rights-of-way an amount, however characterized, greater than two (2) percent of the Cooperative's gross receipts in said municipality. In such an event the Cooperative's payments under this section shall be increased to an amount equal to that proportionately higher rate of the Cooperative's said gross receipts within the City. The Cooperative's payments shall be increased pursuant to this section in those instances in which the Cooperative enters into such agreement or renews or extends a franchise agreement adopted by any municipality on or after the effective date of this Ordinance.

10 2 1 The increased payments to the City provided by this section shall be subject to the same method or terms of collecting of such fee from the Cooperative's customers. The Cooperative shall notify the City of such increase within thirty (30) days of the other payment's effective date. Collections of the franchise fee and payments to the City will be based on such higher rate from the first date of the first month next following the date the City accepts and authorizes the increase. The City's acceptance and authorization shall be on the same terms as those in effect for the other municipality. The collection of the franchise fee and the increased payment shall continue until expiration of term of this franchise or until the expiration of the franchise agreement of such other municipality, whichever is earlier.

10.2.2. Nothing in this section shall alter or affect the dates upon which the payments specified in this franchise are payable or the period to which each of said payments are referable as provided in Section 10 3. The audit provisions of this franchise shall extend to any and all records of payments between other municipalities and the Cooperative.

10 2 3 The Cooperative's payments shall not be increased under this section in those instances in which the Cooperative succeeds to or is assigned an existing franchise through the acquisition by merger or otherwise of another electric utility.

10 2 4 Neither shall the increased payments contemplated by this Section take effect if the term of the increased payments does not exceed three (3) years in the aggregate. This term may be increased by the City in the event that the City determines that the Cooperative and such other municipality are negotiating in good faith.

10 3 The franchise fee specified in section 10 1 shall be payable quarterly to the City and shall be delivered to the City's Chief Financial Officer of Financial Services, together with a statement indicating the derivation and calculation of the payment. Each quarterly payment shall be due by 12:01 p.m. on the fifteenth (15<sup>th</sup>) day of the second month following the end of the quarterly period for which the payment is due. The quarterly payment shall be based upon the Cooperative's gross receipts during that same quarterly period and shall represent payment for the rights and privileges granted to the Cooperative by this franchise for said calendar quarter.

10 3 1 The quarterly payments shall be due on February 15, May 15, August 15, and November 15 of each year during the term of this franchise.

10.3.2 The February 15 payment shall be based upon the Cooperative's gross receipts during the calendar quarter ending the prior December 31. The May 15 payment shall be based upon the Cooperative's gross receipts during the calendar quarter ending the prior March 31. The August 15 payment shall be based upon the Cooperative's gross receipts during the calendar quarter ending the prior June 30. The November 15 payment shall be based upon the Cooperative's gross receipts during the calendar quarter ending the prior September 30.

10.3.3 In the event any quarterly payment is made after noon on the date due, the Cooperative shall pay a late payment charge of the greater of

(a) \$100 or

(b) Simple interest at 10% annual percentage rate of the total amount past due

10.4 For purposes of verifying the amount of the franchise fee the books of the Cooperative shall at all reasonable times be subject to inspection by the duly authorized representatives of the City.

10.5 The Cooperative shall file annually with the City's Chief Financial Officer, no later than four (4) months after the end of the Cooperative's fiscal year, annual audited statements of the Cooperative. The certified public accountant preparing the statement shall certify that the statement is in accordance with applicable generally accepted accounting principles.

10.6. Except as provided in Section 10.7 the franchise fee shall be in lieu of:

10.6.1 any and all other rentals or compensation or franchise, license, privileges, instrument, occupation, excise, or revenue taxes or fees

10.6.2. all other exactions or charges or permits upon or relating to the business, revenue, franchise, transmission and distribution system, and other facilities or property of the Cooperative and its activities in the City which relate to the operations of the Cooperative's electric utility system

10.7. The franchise fee shall not be in lieu of:

10.7.1 rentals which may be paid for the use of the City's poles under the City's Pole Rental Agreement,

10.7.2 ad valorem property taxes, special assessments for local improvements, City sales tax, and such other charges for utility service imposed uniformly upon persons, firms, or corporations then engaged in business within the City, or

10.7.3 required reimbursements to the City for reasonable expenses incurred in employing consultants in rate proceedings to the extent permitted by law.

10.8. Should the City not have the legal power to agree that the payment of the franchise fee shall be in lieu of the fees and charges described in Section 10.6, the City agrees that it will apply as much of the franchise fee paid by the Cooperative necessary to satisfy the Cooperative's obligations, if any, to pay the fees and charges described in Section 10.6

## **SECTION 11. Indemnity**

11.1 The Cooperative agrees to indemnify, defend, and save harmless the City, its agents, officers and employees, against and from any and all claims by or on behalf of any person, firm, corporation or other entity, to the extent they arise from the Cooperative's negligence or willful misconduct, and that of its agents and contractors, in connection with construction, operation, or management of its transmission and distribution system, and from and against all costs, attorneys fees, expenses and liabilities incurred in or about any such claim or proceeding brought thereon, and from any and all claims arising from any breach or default on the part of the Cooperative in the performance of any covenant or agreement on the part of the Cooperative to be performed pursuant to the terms of this agreement.

11.1.1 The City shall promptly notify the Cooperative of any claim or cause of action which may be asserted against the City relating to or covering any matter against which the Cooperative has agreed, as set forth above, to indemnify, defend or save harmless the City

11.1.2 The Cooperative reserves the right, but not the obligation, to employ such attorneys, expert witnesses and consultants as it deems necessary to defend against the claim or cause of action

11.1.3 If the Cooperative and the City are found to be jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of Texas without, however, waiving any governmental immunity available to the City under state law and without waiving any defenses of the parties under state law.

11 2 It is not the intention of either the City or the Cooperative to create any liability, right, or claim for the benefit of third parties. This indemnification provision is intended and shall be construed for the sole benefit of the City and the Cooperative.

## **SECTION 12. City's Right To Purchase Cooperative's System**

12 1 Subject to Section 12 4, the City has the right to purchase the Cooperative's facilities in the public right-of-way at any time within five years before the expiration of this franchise at 1.5 times fair market value, with fair market value to be determined in accordance with Subsection 12.2. For purposes of this section only, the term of this franchise shall be considered to be twelve (12) years. Notwithstanding the provisions of this section, the Cooperative shall have the right to operate its system and receive all revenue therefrom for the term of this franchise as set forth in Section 2. The City may not sell the purchased system within three years of its purchase from the Cooperative.

12 2 Subject to Section 12 4, if the City exercises its right to purchase the Cooperative's system, the City shall notify the Cooperative in writing at least 90 days before the effective date of such purchase. Upon such written notification, the Cooperative and City shall each designate an appraiser experienced and knowledgeable in the valuation of similar systems. Each appraiser shall conduct an independent appraisal of the fair market value of the Cooperative's system as a going concern as of the effective date of the purchase by the City. Each party shall be responsible for the appraisal fees of its own appraisers. In conducting the appraisals, the appraisers shall consider, among other factors:

12.2.1. The book value of the assets constituting the Cooperative's system

12 2 2 The age and condition of the physical plant and equipment

12 2 3. The discounted future revenue stream considering the customer base, discounted in accord with general appraisal practice, for the remaining useful life of the assets constituting the Cooperative's system

If the two independent appraisals result in purchase prices which are within five percent of each other, the purchase price to be paid by the City shall be the average of the two appraisals. If the two appraisals differ by more than five percent, the two appraisers shall select a third appraiser who shall have sixty days in which to determine the appraisal value of the system. The average of the three appraisals will determine the agreed appraisal value.

12 3 Subject to Section 12 4, if upon exercise of this option at the end of the original term, and the payment of the above sum by the City and its service of official notice of the action upon the Cooperative, the Cooperative shall immediately transfer to

the City title to all system and property, real and personal, of the Cooperative's system, free from any and all liens and encumbrances not agreed to be assumed by the City in lieu of some portion of the purchase price, subject to the Cooperative's right to continue to operate and maintain its system within the City for the duration of the term provided in Subsection 12.1 above, and the Cooperative shall execute and deliver such warranty deeds or other instruments of conveyance to City as shall be necessary for this purpose

12.4. The Cooperative recognizes that the provisions of the City Charter require inclusion of this section in the franchise. Specifically, Article XI, Section 2 of the Austin City Charter conditions the grant of a franchise on the City's right to purchase the property of the franchise holder. The Cooperative's acquiescence in this section and provision of the franchise is conditional, subject to the following: (1) the Cooperative's right to challenge this Charter provision, this section of the franchise, or any application thereof on any basis, including as a violation of the Constitution and laws of the United States and/or the State of Texas, (2) the satisfaction of all conditions for the sale of such property contained in the Cooperative's Master Indenture of Trust, or successor document, applicable to such property, and (3) the granting to the City by the Public Utility Commission of Texas of a certificate of convenience and necessity, as identified in Chapter 37 of the Texas Utilities Code, that includes the area in which the facilities are located

### **SECTION 13. Violations.**

13.1. If the Cooperative is in violation of this franchise, the Chief Financial Officer or designee shall notify the Cooperative in writing of the violation setting forth the nature of such violation. Within 21 days of receipt of such notice, or such longer period specified by the Chief Financial Officer, the Cooperative shall respond in writing that the violation has been cured or provide a cure plan or schedule that satisfies the Chief Financial Officer or provide an explanation with documentation to support that an alleged violation did not occur.

13.2. Notwithstanding Subsection 13.1, the Cooperative shall be allowed 30 days to cure violations after written notice is received from the City, by taking appropriate steps to comply with the terms of this franchise and any lawful regulations. If the nature of the violation is such that it cannot be fully cured within 30 days due to circumstances not under the Cooperative's control, the period of time in which the Cooperative must cure the violation may be extended by the Chief Financial Officer in writing for such additional time reasonably necessary to complete the cure, provided that (i) the Cooperative has promptly begun to cure, and (ii) the Cooperative is diligently pursuing its efforts to cure in the Chief Financial Officer's reasonable judgment.

13.3 At the Cooperative's request, the City shall afford the Cooperative an opportunity to show that a violation has not occurred, through an administrative hearing on thirty 30 days' notice before an impartial hearing examiner jointly designated by the City Attorney and the Cooperative within 30 days of the Cooperative's request

If as a result of the administrative hearing, the hearing examiner determines that a violation has not occurred, the City shall pay all of the expenses related to the administrative hearing. If a violation has occurred, the Cooperative shall pay the expenses. After the conclusion of the administrative hearing either party may seek any and all remedies which it may have at law.

13.4 Upon evidence being received by the City that violations of this franchise, City Charter provisions or the ordinances regulating the Cooperative in the construction and operation of its system have occurred, or continue to occur after the 30 days period, and any additional time necessary to cure, as allowed under Section 13.2, the City may make an investigation. If the City finds that such a violation continues to exist or has occurred, then the City or the Cooperative may take an action authorized by law, subject to Section 15, including forfeiture of this franchise and a suit in court to compel compliance. In any such proceeding the non-prevailing party shall be required to pay the reasonable expenses incurred by the prevailing party in such suit and all damages and costs (including attorney fees), but the Cooperative may be allowed, either by the court in the judgment of forfeiture or by order of the City Council, a reasonable time thereafter, as fixed by such judgment or order, to correct the default and pay such expenses, damages and costs as it may be adjudged to pay, and if the Cooperative does so correct and so pay within a reasonable time, forfeiture shall not become effective nor be enforced.

13.5 Failure by the City or the Cooperative to enforce rights under this franchise does not constitute a waiver of the rights.

#### **SECTION 14. Notices**

Notices from the Cooperative to the City under this franchise shall be directed to the City Attorney and the Chief Financial Officer, individually, at P O Box 1088, Austin, Texas 78767. All notices to the Cooperative pursuant to this franchise shall be to the corporate officer designated by the Cooperative in writing. The Cooperative shall also provide a telephone number operational during normal business hours for the conduct of matters related to this franchise. Any change in address or telephone number shall be furnished to the City 10 days prior to the change.



## **SECTION 15. Forfeiture and Termination**

15 1 In addition to all other rights and powers retained by the City under this franchise or otherwise, the City reserves the right to declare this franchise forfeited and to terminate the franchise and all rights and privileges of the Cooperative hereunder in the event of a material breach of its terms and conditions. A material breach by the Cooperative shall include, but shall not be limited to, the following

15 1 1 failure to pay the fee prescribed by Section 10 herein;

15 1 2 a material misrepresentation of fact in the application for or negotiation of the franchise, and

15 1 3 conviction of any director, officer, employee, or agent of the Cooperative of the offense of bribery or fraud connected with or resulting from the awarding of this franchise to the Cooperative

15 2 The foregoing shall not constitute a material breach of this franchise if the violation occurs without the fault of the Cooperative or of its employees or occurs as a result of circumstances beyond the Cooperative's control. The Cooperative shall not be excused by mere economic hardship nor by misfeasance or malfeasance of its directors, officers, or employees

15 3 To declare a forfeiture of this franchise, the City shall make written demand that the Cooperative comply with any provision, rule, order or determination pursuant to or contained within this franchise. If the Cooperative fails to take expeditious corrective action within thirty (30) days following receipt of the written demand to cure the violation, the Council may terminate the franchise. The City shall cause to be served upon the Cooperative, at least twenty (20) days prior to the date of consideration of termination of the franchise by the Council in open meeting, a written notice of Council's intent to consider such termination and the time and place of the meeting.

15 3 1 Upon meeting pursuant to notice, the Council shall (1) hear and consider the issue, (2) hear any interested person, and (3) shall determine whether or not any violation by the Cooperative has occurred.

15 3 2 If the Council determines that a violation occurred and that the violation was the fault of the Cooperative and within its control, the Council may declare the franchise of the Cooperative forfeited and terminated. The Council may also take such other appropriate action including, but not limited to, granting a period of time to cure the violation

## **SECTION 16. Foreclosure, Receivership and Bankruptcy**

The Cooperative shall notify the City within thirty (30) days after the appointment of a receiver or trustee to take over and conduct the business of the Cooperative, whether in receivership, reorganization, bankruptcy, or other action or proceeding, whether voluntary or involuntary, such notice to include where applicable the cause number and court involved.

### **PART 3.**

In compliance with the provisions of the Charter of the City, this Ordinance, upon being introduced at a regular meeting of the Council, shall be read at three (3) separate regular meetings of the Council and shall not be passed finally until thirty (30) days after the first reading. In accordance with the Charter and state law, within five (5) days following each of its three (3) readings the caption of this Ordinance shall be published one (1) time in a daily newspaper published in the City, and the cost of publication shall be reimbursed by the Cooperative. This ordinance shall take effect sixty (60) days after its final passage, if the franchise is accepted in writing by the Cooperative, and the Cooperative files its acceptance with the City Clerk of the City within sixty (60) days following the final adoption of this ordinance by the Council in the following form

To the Honorable Mayor and City Council

Pedernales Electric Cooperative acting by and through the undersigned and authorized officer, hereby accepts, on this \_\_\_\_\_ day of \_\_\_\_\_, 2008, Ordinance No \_\_\_\_\_, being a franchise passed and adopted by the City of Austin, Texas, duly approved by the Mayor and attested by the City Clerk on \_\_\_\_\_, 2008 the same being, "AN ORDINANCE GRANTING TO THE PEDERNALES ELECTRIC COOPERATIVE, INC , ITS LEGAL REPRESENTATIVES, SUCCESSORS, LESSEES AND ASSIGNS CERTAIN POWERS, LICENSES, RIGHTS-OF-WAY, PRIVILEGES AND FRANCHISE TO CONSTRUCT, MAINTAIN, OPERATE AND USE A TRANSMISSION AND DISTRIBUTION SYSTEM IN THE CITY OF AUSTIN TO PROVIDE ELECTRIC UTILITY SERVICE "

and files herewith its acceptance of this franchise as required by the terms of the franchise ordinance.

IN TESTIMONY WHEREOF, witness the corporate signature of Pedernales Electric Cooperative by its duly authorized officer, this the \_\_\_\_\_ day of \_\_\_\_\_, 2008

PEDERNALES ELECTRIC COOPERATIVE, INC

BY \_\_\_\_\_

(title)

**PART 4.**

The City Clerk is hereby authorized and directed to make appropriate endorsements over his official hand and the seal of the City, on a form provided at the conclusion of the Ordinance, of the dates upon which this Ordinance shall have been read at three (3) separate regular meetings of the Council and the date of final passage of this Ordinance, and the date upon which this Ordinance shall take effect, being sixty (60) days after the date of final passage, if the Cooperative shall have accepted this franchise, and the dates upon which the caption of this Ordinance shall have been published, and the name and address of the daily newspaper in which such publications were had in the City

**PART 5.** This ordinance takes effect on October 27, 2008

PASSED AND APPROVED

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§  
§  
§

October 16, 2008

Brewster McCracken

for Will Wynn  
Mayor

APPROVED:

David Allan Smith

David Allan Smith  
City Attorney

ATTEST:

Shirley A Gentry

Shirley A Gentry  
City Clerk